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NO. 05-1657

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Where authorized by statute, collective bargaining agreements may contain a union security provision, which requires employees who are not members of the union to pay an agency shop fee to the union as a condition of employment. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held that, to protect these nonmembers' First Amendment rights, the union is prohibited from using these fees to support its political agenda if the nonmember objects (opts-out). Wash. Rev. Code § 42.17.760 provides additional protection for nonmembers by requiring them to affirmatively consent (opt-in) before their fees may be used for political purposes.

Does the requirement in Wash. Rev. Code § 42.17.760 that nonmembers must affirmatively consent (opt-in) before their fees may be used to support the union's political agenda violate the union's First Amendment rights?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Washington (Pet. App. 1a) is reported at 156 Wash. 2d 543, 130 P.3d 352. The opinion of the Washington Court of Appeals (Pet. App. 48a) is reported at 117 Wash. App. 625, 71 P.3d 244. The trial court's Order Regarding Cross-Motions For Summary Judgment (Pet. App. 115a), Letter Opinion (Pet. App. 102a), Findings Of Fact And Conclusions Of Law (Pet. App. 92a), Permanent Injunction (Pet. App. 84a, J.A. 208), and Judgment (Pet. App. 81a) are unpublished.

JURISDICTION

The judgment of the Supreme Court of Washington was entered March 16, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

Wash. Rev. Code § 42.17.760 provides: "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Pet. App. 138a.

Other relevant statutes and regulations are set out in the Appendix To The Petition For A Writ Of Certiorari at pages 124a through 156a.

STATEMENT

1. Background

This case concerns a state's authority to regulate the permissible scope of union security agreements allowed under state law. A union security agreement is a provision in a collective bargaining agreement under which the employer agrees to discharge employees who do not join the union or pay an agency fee to the union.[1] The requirement at issue in this case is that the union may not use agency fees paid by nonmembers to influence the outcome of an election or operate a

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[1] There are different types of union security agreements. "A 'union shop' agreement provides that no one will be employed who does not join the union within a short time after being hired." *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 n.1 (1976). "An 'agency shop' agreement generally provides that while employees do not have to join the union, they are required—usually after 30 days—to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the union equal to the union dues." *Id.*

political committee without the nonmembers' affirmative authorization.

Union security agreements are within legislative prerogative. They may be authorized or prohibited by statute. For example, the National Labor Relations Act authorizes union security agreements. 29 U.S.C. § 158(a)(3).[2] However, the National Labor Relations Act also provides that states may prohibit union security agreements, 29 U.S.C. § 164(b),[3] and some states have done so by enacting "right to work" laws that prohibit employers from discharging employees because they do not belong to a union. This Court has ruled that right to work laws do not violate a union's First Amendment rights of speech or assembly. *Lincoln Fed. Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949) ("The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in

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[2] 29 U.S.C. § 158(a)(3) provides that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."

[3] 29 U.S.C. § 164(b) provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

the assembly or will agree to abide by the assembly's plans.").

Union security agreements burden the First Amendment rights of nonmembers who are forced to contribute to the union. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."). However, requiring payment of an agency shop fee does not violate the nonmembers' First Amendment rights when it "is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment . . . ." *Id.* at 225–26. This interference with the nonmembers' First Amendment rights is justified on two grounds. The first is the government's interest in labor peace. The second is that an agency shop fee that is used to support collective bargaining activities eliminates "free riders"—employees of a bargaining unit who would receive union representation services at no cost. Unions that are the exclusive bargaining representative for employees are required to fairly and equitably represent all employees—members and nonmembers alike. The agency shop fee pays for the representation of the nonmembers. *Id.* at 221–26. Without this payment, a nonmember would be a free rider.

On the other hand, the First Amendment rights of objecting nonmembers are violated if the agency shop fee is used for activities unrelated to collective bargaining, such as litigation that does not

concern the nonmembers' bargaining unit or expenditures for general public relations. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528–29 (1991). Moreover, objecting nonmembers can only be required to pay their pro rata or fair share of the costs of collective bargaining and contract administration. Thus, a union cannot simply dedicate the fees paid by nonmembers to collective bargaining purposes. "If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share." *Abood*, 431 U.S. at 237 n.35. "The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. . . . By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Id.*

This case concerns the Washington Education Association's use of nonmembers' fees to influence the outcome of elections or operate a political committee. This "implicates core First Amendment concerns" of nonmembers. *Lehnert*, 500 U.S. at 516. The First Amendment prohibits the state "from requiring [a nonmember] to contribute to the support of an ideological cause he may oppose as a condition of holding a job . . . ." *Abood*, 431 U.S. at 235. Union expenditures "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its

duties as collective-bargaining representative" may only "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Abood*, 431 U.S. at 235, 236.

In *Chicago Teacher's Union, Local 1 v. Hudson*, 475 U.S. 292 (1986), the Court considered an Illinois statute that allowed the union to collect from nonmembers only "their proportionate share of the cost of the collective bargaining process and contract administration[.]" *Hudson*, 475 U.S. 295 n.1. The Court held that, as a matter of protecting the First Amendment rights of nonmembers, "the constitutional requirements for the Union's collection of agency fees include [1] an adequate explanation of the basis for the fee, [2] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and [3] an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310. *Hudson* "outlined a *minimum set of procedures* by which a union in an agency-shop relationship could meet its requirement under *Abood*", that the union "not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining." *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (emphasis added); *id.* at 13.

Washington law authorizes union security agreements.[4] Wash. Rev. Code § 28B.52.045(2);[5] Wash. Rev. Code § 41.56.122(1);[6] Wash. Rev. Code § 41.59.100.[7] If a collective bargaining agreement includes a union security provision, nonmembers will pay an agency shop fee to the union. In Washington, "general membership dues of a labor organization may be used as a source for political contribu-

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[4] Under the National Labor Relations Act, the term "employer" excludes "any State or political subdivision thereof . . . ." 29 U.S.C. § 152(2). Thus, the "Act leaves regulation of the labor relations of state and local governments to the States." *Abood*, 431 U.S. at 223. Accordingly, states are free to authorize union security agreements for public employees if they so choose.

[5] Wash. Rev. Code § 28B.52.045(2) provides: "A collective bargaining agreement may include union security provisions, but not a closed shop. If an agency shop or other union security provision is agreed to, the employer shall enforce any such provision by deductions from the salary of bargaining unit employees affected thereby and shall transmit such funds to the employee organization or to the depository designated by the employee organization." Pet. App. 124a. This statute applies to academic personnel at community colleges.

[6] Wash. Rev. Code § 41.56.122 provides: "A collective bargaining agreement may: (1) Contain union security provisions . . . ." Pet. App. 129a. This statute applies to employees of political subdivisions of the State.

[7] Wash. Rev. Code § 41.59.100 provides: "A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues." Pet. App. 131a. This statute applies to teachers and other certificated employees of school districts.

tions." *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 140 Wash. 2d 615, 631, 999 P.2d 602 (2000).

The minimum First Amendment protection for nonmembers prohibits a union from using their fees for ideological purposes if the nonmembers objected (opted-out) in the face of a statute otherwise authorizing such use. However, Washington goes beyond the minimum First Amendment protection for nonmembers. Wash. Rev. Code § 42.17.760 provides:

> "A labor organization may not use *agency shop fees paid* by an individual who is *not a member* of the organization to make contributions or expenditures to *influence an election or to operate a political committee*, unless *affirmatively authorized* by the individual." Pet. App. 138a (emphasis added).

Thus, Wash. Rev. Code § 42.17.760 establishes an opt-in procedure before nonmembers' fees may be used by the union to influence the outcome of an election.

2. Proceedings Below

Respondent Washington Education Association (WEA) is a labor union that represents educational employees in Washington's common schools (K–12), community colleges, and universities. The WEA has about 70,000 members. J.A. 140. The WEA has entered into collective bargaining agreements with public employers that contain union security provisions requiring nonmembers to pay an agency shop fee as a condition of continued

employment. Every year, the WEA has between 3,000 and 4,000 nonmember fee payers. J.A. 55.

Around the end of August each year, the WEA sends out a "*Hudson* packet" to nonmembers notifying them of their right to object to paying fees for non-chargeable expenditures and to challenge WEA's calculation of the fee. J.A. 97, 114–15; J.A. 194 (Ex. 41). The *Hudson* packet sets out the amount of the dues and describes the chargeable and nonchargeable activities. The chargeable activities are those the WEA has identified as relating to collective bargaining and contract administration. The nonchargeable activities relate to other union activities such as political expenditures, donations, and other activities that do not serve nonmembers. J.A. 203 (Ex. 41, Pet. App. F).

The WEA begins making deductions from the nonmembers' paychecks at the end of September. J.A. 97. The nonmembers have 30 days from the date the *Hudson* packet is sent out to notify the WEA that they object. During that period, the nonmembers' fees are placed in a separate escrow account. J.A. 98. If they do not object within 30 days, they are deemed by the union to have waived their right to object. J.A. 121, 194 (Ex. 41).

Nonmembers who object to the use of their mandatory fees for nonchargeable purposes receive a refund. Nonmembers who also challenge the WEA's calculation of the nonchargeable amounts may receive an additional refund if their challenge is sustained in arbitration. J.A. 122. After the refunds are paid, the nonmembers' fees in the escrow account are transferred to the WEA's reserve account, where

they are available for the WEA's general use. J.A. 94, 98.

The Washington State Public Disclosure Commission (PDC) is the state agency charged with enforcing Washington's campaign finance laws. In 2000, the Washington State Attorney General's Office referred a letter it received to the PDC for investigation. J.A. 159. The letter alleged that the WEA had violated Wash. Rev. Code § 42.17.760 (§ 760) by using nonmembers' fees to influence an election, without the affirmative authorization of the nonmembers.

After an investigation, the PDC and the WEA entered into a stipulation that the WEA's "general fund money was used to make contributions and expenditures to influence an election and to operate a political committee," and that the WEA "did not have affirmative authorization from agency fee payers to use their money for these purposes." Pet. App. 121a ¶¶ 3, 4. The PDC and the WEA agreed that the WEA "committed multiple violations of [Wash. Rev. Code §] 42.17.760" during the WEA's 1999–2000 fiscal year. Pet. App. 122a. Based on the stipulation, the PDC issued an order referring the case to the Attorney General's Office for prosecution, in lieu of conducting an administrative proceeding. Pet. App. 119a. The PDC took this action because "the maximum penalty that can be assessed by the [PDC] is inadequate in light of the apparent violations." Pet. App. 120a.

a. Trial Court

The Attorney General's Office filed a complaint against the WEA alleging that the WEA

had violated § 760 during the previous five years. J.A. 76–79. The complaint sought a civil penalty, treble damages, if the violations were intentional, and costs of investigation and trial, including reasonable attorney's fees. J.A. 79. The WEA filed an answer and affirmative defenses. J.A. 82–86. Both parties moved for summary judgment. The trial court entered summary judgment in favor of the state that § 760 was constitutional, that § 760 required affirmative authorization from the nonmembers, and that the WEA's *Hudson* procedure did not satisfy the requirement of § 760. Pet. App. 117a ¶¶ 1, 3. The court concluded that there was an issue of material fact about whether the WEA used agency fees to influence an election or to support a political committee. Pet. App. 117a ¶ 5.

After a bench trial, the court issued a letter opinion and entered findings of fact and conclusions of law. Pet. App. 102a, 92a. The trial court found that for each fiscal year from 1996 to 2000, the WEA used nonmembers' fees for contributions or expenditures to influence an election or to operate a political committee. Pet. App. 96a ¶ 20. The court further found that approximately 8000 nonmembers did not give their consent during this time and imposed a civil penalty of $25 per nonmember for a total civil penalty of $200,000. Pet. App. 96a ¶ 21. The court also found that the WEA "intentionally chose not to comply with [Wash. Rev. Code §] 42.17.760." Pet. App. 98a ¶ 29. Based on the intentional violation, the trial court doubled the civil penalty to $400,000. Pet. App. 98a ¶ 30. The court also awarded the state its costs and attorney's fees. Pet. App. 98a ¶ 33. The amount of the costs and

attorney's fees was $190,375. Pet. App. 6a. Thus, the total judgment against the WEA was $590,375. Pet. App. 6a.

The trial court also entered a permanent injunction. Pet. App. 84a. Under the injunction, the WEA was required to issue a refund to nonmembers who did not object under the WEA's *Hudson* process for fiscal years 2001–2002 and 2002–2003. Pet. App. 87a ¶ 2(a)–(d). The injunction also set out the manner in which the WEA was to comply with § 760 for fiscal years 2003–2004 and thereafter. Under the injunction, the WEA would charge nonmembers less than 100% of member dues. The reduction was based on the expenditures the WEA made in the second previous fiscal year to influence an election or operate a political committee, plus a cushion of 3% of the annual agency fee for the respective fiscal year. Pet. App. 88a ¶ 2(e).

b. Washington Court Of Appeals

The WEA appealed to the Washington Court of Appeals. A divided three judge panel reversed the trial court and held that § 760 is unconstitutional. Pet. App. 48a. The majority began by recognizing that the "only authority that a union has to compel nonmembers to pay agency fees is statutory." Pet. App. 56a. The court then reviewed *International Association of Machinists v. Street*, 367 U.S. 740 (1961), *Abood*, 431 U.S. 209, and *Hudson*, 475 U.S. 292. It concluded that these cases stand for the proposition that "nonmembers who do not want the union to use their fees for non-chargeable expenditures must make their objection known to the union." Pet. App. 61a. Thus, the majority considered

the constitutionally required opportunity for nonmembers to object—part of the *minimum set of procedures* that a union must provide where a law otherwise authorizes use of nonmembers' fees for ideological purposes (*Keller*, 496 U.S. at 17)—the maximum protection that a state may require. The majority reasoned that "[§ 760] relieves nonmembers of their burden of objection" by creating "an 'opt-in' procedure—nonmembers must give their authorization before the union may use their fees on political expenditures." Pet. App. 63a; 63a–64a. The majority concluded that this opt-in procedure "does not follow the Court's carefully crafted and balanced approach" set out in *Street*, *Abood*, and *Hudson*. Pet. App. 64a. The majority held that § 760 violated the First Amendment rights of the union and its members because the "opt-in procedure[] upset the balance between nonmembers' rights and the rights of the union and the majority." Pet. App. 68a.

The dissent also reviewed *Street*, *Abood*, and *Hudson*. However, the dissent concluded that these cases "simply uphold 'opt out' procedures" to protect the First Amendment rights of nonmembers. Pet. App. 75a. "None . . . hold that the Constitution *requires* an 'opt out' procedure or that the burden of dissent must be on the objecting employee." Pet. App. 75a. Moreover, "none of these cases hold that a statutory 'opt in' procedure, such as the one in [§ 760], is constitutionally infirm . . . ." Pet. App. 75a.

After the Court of Appeals ruled, the WEA moved for an order staying the injunction issued by the trial court. The court granted the stay. Pet. App. 79a.

c. Washington Supreme Court

The Supreme Court of Washington granted the State's petition for review of the Court of Appeal's decision and affirmed by a vote of six to three. Pet. App. 1a.

The court began by considering whether the WEA's *Hudson* procedure satisfied the requirements of § 760. The court concluded that it did not. According to the majority, the plain language of § 760 "seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement." Pet. App. 10a. The majority reasoned that "[t]he difference is that affirmative authorization seems to indicate that the member must say 'yes,' instead of failing to say 'no.'" Pet. App. 10a.

The court next took up the question of whether § 760 violated the First Amendment. The court reviewed *Street*, *Abood*, *Hudson*, and *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984). Pet. App. 15a–17a. Based on its review of these decisions, the majority held "that a union has the right to use nondissenting nonmember fees for political purposes." Pet. App. 26a. The majority understood this right to be a First Amendment right of the union, and so concluded that § 760's "restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest." Pet. App. 26a.

The majority stated that the opt-in requirement of § 760 "has the practical effect of

inhibiting one group's political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers)." Pet. App. 19a. According to the majority, § 760 imposed unconstitutional burdens on both the union and its members, and nonmembers who wanted to support the union's political message. With regard to the union, the majority stated that the "WEA presented evidence that the procedures required by the State's interpretation of § 760 would be extremely costly and would have a significant impact on the union's political activities." Pet. App. 20a. With regard to nonmembers, the majority stated that "§ 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." Pet. App. 20a–21a.

The State argued that the cases relied on by the majority were "different because [none considered] a state statute that expressly calls for affirmative authorization of nonmembers." Pet. App. 21a. The majority rejected this argument, concluding that increased "protection for nonmembers, as asserted by the State, tips the scales of First Amendment rights in favor of the dissenting nonmember, while increasing the burden on the nonmember who supports the union's political causes and also on the union, which must bear the administrative costs." Pet. App. 22a.

Finally, the majority applied this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to conclude that § 760 violated the WEA's right of expressive association. In *Boy Scouts*, this Court held that a state public accommodation law

requiring the inclusion of a homosexual as an assistant scout master violated the Scout's First Amendment right of expressive association. *Boy Scouts*, 530 U.S. at 656. The forced inclusion significantly "affect[ed] the group's ability to advocate public or private viewpoints." *Id.* at 648. The majority below reasoned that because § 760 "regulates the relationship between the union and agency fee payers with regard to political activity, the *Boy Scouts* analysis should be applied . . . ." Pet. App. 27a. The majority determined that the WEA engages in expressive activity because the "WEA engages in political and ideological activities not related to collective bargaining or contract administration." Pet. App. 29a–30a. The majority concluded that the opt-in requirement burdened the WEA's expressive association because "under the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit." Pet. App. 30a. The opt-in requirement "encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember." Pet. App. 30a. The majority held that the opt-in requirement was not narrowly tailored because the "opt-out alternative . . . reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's associational freedoms than [§ 760]'s opt-in requirement." Pet. App. 33a.

Three Justices dissented. According to the dissent, the "majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to cause employers not only to withhold and

remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount." Pet. App. 35a. "Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it." Pet. App. 35a. Indeed, the dissent pointed out that some states "entirely bar union security agreements and outlaw agency shops as well." Pet. App. 35a. Given that the legislature could prohibit union security agreements, the dissent found "it nearly beyond comprehension to claim that the legislature . . . could not qualify these statutes . . . ." Pet. App. 37a.

According to the dissent, the "holdings of all the cases cited by the majority amount to a simple proposition: the constitution requires *at least* an opt-out scheme to protect dissenters' rights. None of these cases stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in scheme." Pet. App. 41a (footnote omitted).

The dissent also rejected the majority's reliance on *Boy Scouts*. The majority's reasoning was flawed because there was "*no* association between the union and agency fee payers because by definition these individuals have refused to join (associate with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy." Pet. App. 46a.

The State filed its Petition For A Writ Of Certiorari June 14, 2006. The Court granted the petition September 26, 2006.

SUMMARY OF ARGUMENT

The majority below erred in holding that Wash. Rev. Code § 42.17.760 violates the First Amendment by requiring the affirmative authorization of nonmembers before a union may use their agency shop fees to influence the outcome of an election or to operate a political committee. A union has no First Amendment right to compel nonmembers to join the union or to pay fees. *Lincoln Fed. Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Where a union has such a right, it is based in statute.

Statutes that authorize union security provisions compelling union membership or payment of agency shop fees burden the First Amendment rights of nonmembers. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). They are permissible only because of the government's interest in labor peace and in ensuring that all represented employees pay their fair share for the collective bargaining-related activities of the union. *Id.* at 221–26. By the same token, the First Amendment rights of objecting nonmembers are violated if their agency shop fees are used for ideological activities unrelated to collective bargaining. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528–29 (1991). To protect nonmembers from this infringement, at a *minimum*, the First Amendment requires the union to afford nonmembers the opportunity to object to the use of the nonmembers' agency fees for purposes not

germane to collective bargaining. *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990).

The majority below mistakenly converted this minimum protection of nonmembers, required by the First Amendment, into a First Amendment right of the union to use nonmembers' fees for ideological purposes, unless the nonmember objects. Similarly, the majority below mistakenly treated this minimum First Amendment protection of nonmembers as the maximum protection that a state may provide to nonmembers. In the face of statutes authorizing union security provisions, *Hudson* and the other cases relied upon by the majority require certain minimum procedures to protect nonmembers, not unions. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 877 (1998). And the Court has recognized in the context of a compelled speech claim that government may provide greater protection than the minimum required by the First Amendment. *Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 232 (2000).

Washington's affirmative authorization requirement provides additional protection for nonmembers, and does not violate the First Amendment rights of unions or their members. Section 760's opt-in provision ensures that when nonmembers' fees are used by the union to influence an election, their use actually accords with the wishes of the nonmember and is not simply use by default, stemming from the nonmember's inaction. Section 760's opt-in protection also is consistent with the limited reasons that union security provisions are permitted in the first place, and with the

nonmembers' decision not to associate with the union by declining membership.

The additional protection that § 760 provides to nonmembers does not infringe on the associational rights of the WEA or its members. It does not preclude the WEA or its members from associating or restrict the use of members' dues. Section 760 regulates only the union's use of nonmember fees. Nor does § 760 require the WEA or its members to participate in or support political causes or views with which they disagree. In light of the fact that right to work laws do not infringe on a union's right to association (*Lincoln Fed.*, 335 U.S. at 530–31), it cannot seriously be contended that the cost of complying with § 760 does.

ARGUMENT

Section 760 prohibits the WEA from using nonmembers' fees to influence an election or support a political committee, absent the nonmembers' affirmative authorization. The First Amendment protects nonmembers from being compelled to support ideological causes with which they disagree. "[T]he heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234–35. "The fact that [nonmembers] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id.* at 234.

The decision below interprets this First Amendment protection of nonmembers' rights as a constitutional ceiling, foreclosing the state from providing greater protection for nonmembers. According to the majority below, the State cannot provide additional protection for the rights of nonmembers—such as its opt-in requirement—because doing so would infringe on the First Amendment rights of the union to use nonmembers' fees. The majority below is mistaken. Unions have no First Amendment right to collect or use the compulsory fees of nonmembers. The union's right to collect and use nonmembers' fees even for purposes germane to collective bargaining is a matter of legislative prerogative. It exists only where statutes authorize such use. In the absence of any such constitutional right in the union, nothing prevents the state from providing greater protection for nonmembers.

1. The WEA Does Not Have A First Amendment Right To Use Nonmember Fees To Influence An Election

The decision below turns on the majority's conclusion that the WEA has a First Amendment right to use nonmember fees to influence an election. Pet. App. 26a. The union has no such right. The WEA's authority to collect an agency shop fee from nonmembers is based solely on state statutes, and § 760 requires nonmembers' affirmative authorization before their fees may be used for ideological purposes.

a. Unions Do Not Have A First Amendment Right To Require Workers To Join Or Pay Fees

Unions do not have a First Amendment right to require workers to either join the union or to pay fees to the union. The Court settled this question in *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). *Lincoln Federal* involved a challenge to two state right to work laws providing "that no person in those states shall be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization." *Lincoln Federal*, 335 U.S. at 527–28. The union argued these laws abridged "the freedom of speech and the opportunities of unions and their members 'peaceably to assemble, and to petition the Government for a redress of grievances.'" *Id.* at 529.

The Court rejected this claim. First, the Court stated that "[n]othing in the language of the laws indicates a purpose to prohibit speech, assembly, or petition. Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members." *Id.* at 530. According to the Court, it was "difficult to see how enforcement of this state policy could infringe the freedom of speech of anyone, or deny to anyone the right to assemble or to petition for a redress of grievances." *Id.* The Court concluded:

> "The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans." *Lincoln Fed.*, 335 U.S. at 531.

Thus, *Lincoln Federal* establishes the principle that unions do not have a First Amendment right to compel nonmembers to join the union or to pay fees to the union. To the extent a union has the authority to compel nonmembers to join or to pay fees, it is by virtue of statute.

b. Union Authority To Spend Fees Collected From Nonmembers For Ideological Purposes Is Based Solely On Statute

The majority below understood this Court's decisions in *Street*, *Abood*, *Hudson*, and *Ellis* to conclude that unions have a First Amendment right to use nonmembers' fees for ideological purposes. The majority misconstrues these decisions. In *Street*, *Abood*, and *Ellis*, the authority of the union to use nonmembers' fees for ideological purposes was based on statute—not on the First Amendment. And in *Hudson*, the union had no right to use nonmember fees for ideological purposes at all, as the statute in that case prohibited such use.

Street and *Ellis* both dealt with the Railway Labor Act. The Railway Labor Act permitted "agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class . . . ." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 746 n.1 (1961) (quoting 45 U.S.C. § 152, Eleventh (a)). The plaintiffs objected to paying dues to the union because "the money each was . . . compelled to pay to hold his job was in substantial part used to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed." *Street*, 367 U.S. at 744.

The Court interpreted the Railway Labor Act to deny unions the power to use employees' dues to support a political cause over the employees' objection. *Street*, 367 U.S. at 768–69 ("[W]e hold . . . that [45 U.S.C. § 152], Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."). The Court emphasized that the plaintiffs' "right of action stems . . . from [45 U.S.C. § 158] Eleventh itself . . . the spending of their funds for purposes not authorized by the Act in the face of their objection[.]" *Id.* at 771. And the Court explained that safeguards of the Act "were added for the protection of dissenters' interest." *Id.* at 774. Similarly, in *Ellis*, the Court confirmed that the Railway Labor Act "does not authorize a union to spend an objecting employee's money to support political causes." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 438 (1984).

Nothing in *Street* or *Ellis* suggests that, absent objection, the unions had a First Amendment right to use nonmembers' fees for ideological purposes. Indeed, if the unions had such a right, the analysis and conclusions in those cases would be considerably different. Each case analyzed the unions' rights as a statutory matter. As the Court interpreted the Railway Labor Act, the union could not use employees' fees for ideological purposes if the employees objected. The Court construed the act to allow such use absent objection.

Abood concerned a Michigan law that authorized union security agreements for employees of local governments. Under "Michigan law employees of local government units enjoy rights parallel to those protected under federal legislation: the rights to self-organization and to bargain collectively." *Abood*, 431 U.S. at 223. The Michigan law "sanctions the use of nonunion members' fees for purposes other than collective bargaining." *Id.* at 232. This included spending "in support of political candidates . . . ." *Id.* at 215.

The plaintiff nonmembers argued that the statute violated their First Amendment rights. Since the statute permitted using nonmember fees for ideological purposes, the Court confronted the First Amendment claim of the nonmembers. The Court held that the First Amendment prohibits the union "from requiring any of the [nonmembers] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Abood*, 431 U.S. at 235. It is true that the Court did not foreclose "a union [from] constitutionally spend[ing] funds for the expression

of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood*, 431 U.S. at 235. But neither did the Court hold that the union has a First Amendment right to support such causes using nonmembers' fees. Rather, that right was based on Michigan's statute, and the Court held that the First Amendment rights of nonmembers require "that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 236. In short, in *Abood*, the authority of the union to use nonmembers' fees for ideological purposes was derived from a statute—not the First Amendment. The First Amendment protected nonmembers from having their fees used for ideological purposes if they objected.

Hudson concerned an Illinois statute that authorized union security agreements. Unlike the Railway Labor Act and the Michigan statute at issue in *Abood*, the Illinois law in *Hudson*, prohibited using nonmember fees for ideological purposes. Under the statute, the union was only authorized to collect from nonmembers "their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members." *Chicago Teacher's Union, Local 1 v. Hudson*, 475 U.S. 292, 295 n.1 (1986). The "Union determined that the 'proportionate share' assessed on nonmembers was 95% of union dues." *Id.* at 295. The employer

"accepted the Union's 95% determination [and] began to deduct the fee from the paychecks of nonmembers . . . ." *Hudson*, 475 U.S. at 296. Plaintiff nonmembers brought an action claiming that, even though they were only paying 95% of the dues of a member, some of their proportionate share was being used for an impermissible purpose. *Id.* at 297.

The Court held that the procedure adopted by the union to collect the nonmembers' fees was constitutionally inadequate. According to the Court:

> "We hold today that *the constitutional requirements for the Union's collection of agency fees* include an adequate explanation of the basis for the fee, a reasonably prompt *opportunity to challenge the amount of the fee* before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310 (emphasis added).

Hudson is significant because the statute at issue prohibited the union from using nonmembers' fees for ideological purposes. The Court found no constitutional fault with the Illinois statute. Rather, the Court examined the procedures employed by the union to satisfy Illinois' statutory prohibition and found them wanting. *Hudson* certainly did not confirm a First Amendment right in the union to use nonmembers' fees for ideological purposes in the absence of an objection. The statute precluded such use without need for objection.

Hudson is also significant because it establishes that the First Amendment right of nonmembers to object is not just related to a union's

use of their fees for ideological purposes. The Illinois statute at issue prohibited such use. Despite this fact, the nonmembers had a First Amendment right to object to the calculation of their fair share of the costs of collective bargaining. This makes sense. The only reason that a union can constitutionally compel nonmembers to contribute to the union is the government's interest in labor peace and to require nonmembers to pay their fair share of the costs of collective bargaining-related activities, so that they are not free riders. Since nonmembers are being compelled to contribute to the union, the First Amendment requires the *Hudson* procedure to ensure that they are paying only their fair share.

In sum, the majority below was incorrect in concluding that *Street*, *Abood*, *Hudson*, and *Ellis* confirm a First Amendment right in the WEA to use nonmember fees for ideological purposes. In each case, the statute at issue determined the scope of the union's authority, and the terms of those statutes were tempered only as necessary to protect the First Amendment rights of nonmembers to refrain from compelled speech.

c. The Requirement That A Non-Member Object Does Not Confer A First Amendment Right On The Union To Use The Nonmember's Fees For Ideological Purposes

As we have explained, a union does not have a First Amendment right to use nonmembers' fees for ideological purposes. The contrary conclusion of the majority below is based on the fact that, in the face of

a statute authorizing use of nonmembers' fees for ideological purposes, nonmembers are required to object in order to claim First Amendment protection, and "dissent is not to be presumed." *Abood*, 431 U.S. at 238; *Hudson*, 475 U.S. at 306 n.16.[8]

Requiring nonmembers to object to the use of their fees for ideological purposes, where a statute authorizes such use, hardly supports the notion that a union has a First Amendment right to use nonmembers' fees for ideological purposes unless the nonmember objects. Indeed, such a notion is inconsistent with *Hudson*. As explained above, the Illinois statute at issue in *Hudson* only permitted the union to collect nonmembers' fees based on a proportionate share of the cost of collective bargaining and contract administration. *Supra* p. 26. Under the statute, nonmembers' fees could not be used for

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[8] Although the Court has repeated in passing the phrase "dissent is not to be presumed" in agency fee cases, it is not clear that the Court intended this phrase to apply to nonmembers. The Court first used the phrase in *International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961). *Street* dealt with the Railway Labor Act, which required a union shop. Therefore, every employee was a member of the union. In that context, dissent was not to be presumed because some members chose to be members and supported the union. Other members joined because they were compelled to by the union security provision in the collective bargaining agreement. It makes sense to conclude that dissent is not to be presumed when all employees are union members. However, in the context of an agency shop, it is reasonable to conclude that employees who have chosen to pay fees instead of join the union have, in fact, made their dissent known.

ideological purposes, and nonmembers did not have to object to prevent ideological use of their fees. As the district court in *Hudson* explained, "before any fair share fee may be deducted, a prior adjustment must first be made to account for, and exclude *Abood*-prohibited expenditures. This front-end reduction in fees is mandated by the Illinois [statute.]" *Hudson v. Chicago Teachers Union, Local 1*, 573 F. Supp. 1505, 1519 (D.C. Ill. 1983). *Hudson* implicitly rejects the notion that unions have a First Amendment right to use nonmembers' fees for ideological purposes absent objection by the nonmembers. Of course, nonmembers might disagree with the union's calculations or judgment of the correct amount of the proportionate share. For that reason, *Hudson* requires that the union provide the nonmembers an opportunity to object.

Air Line Pilots Association v. Miller, 523 U.S. 866 (1998), is also inconsistent with the notion that the procedures required by *Hudson* confer a First Amendment right on the union. In *Miller*, a case under the Railway Labor Act, the union adopted the procedures required by *Hudson*, including the opportunity to challenge the amount of the fee before an impartial decision maker. The plaintiff nonmembers brought an action in federal court challenging the amount of the fee. The union argued that the plaintiffs "must exhaust the arbitration process before pursuing judicial remedies." *Miller*, 523 U.S. at 869.

The Court disagreed and "decline[d] to read *Hudson* as a decision that protects nonunion

members at a cost—delayed access to federal court—they do not wish to pay." *Miller*, 523 U.S. at 875. According to the Court, "*Hudson*'s requirement of a 'reasonably prompt decision by an impartial decision-maker' aims to protect the interest of objectors . . . ." *Id.* at 876–77 (citation omitted). The Court refused to read "*Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights." *Id.* at 877.

The purpose of the *Hudson* process is to protect nonmembers, not the union. This purpose is inconsistent with the notion that *Abood* and *Hudson* recognize a First Amendment right on the part of the union to use nonmembers' fees for ideological purposes absent objection by the nonmembers. If the union had such a right, the plaintiffs' failure to object would have triggered it in *Miller*, but it did not.

According to the decision below, the *Hudson* procedure is a constitutional ceiling the state cannot go beyond in protecting nonmembers' First Amendment rights. This view also is inconsistent with *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), in which the Court set out the minimum First Amendment protection required in the face of a compelled speech claim, but explained that the university could provide greater protection if it so chose. In *Southworth*, plaintiff students challenged "a mandatory student activity fee" imposed by the University of Wisconsin System and "used in part by the University to support student organizations engag-

ing in political or ideological speech." *Southworth*, 529 U.S. at 221. The plaintiffs "object[ed] to the speech and expression of some of the student organizations." *Id.* The Court upheld the fee, but to protect the plaintiffs' First Amendment interests, the Court required "viewpoint neutrality in the allocation of funding support." *Id.* at 233.

Under the logic of the decision below, the student organizations using the mandatory student fee to fund their ideological speech would have a First Amendment right to those funds, limited only by the requirement of viewpoint neutrality, and the university would be precluded from further protecting the plaintiffs' First Amendment rights by allowing students to opt-out of the fee. But this would make no sense, and the Court in *Southworth* dispelled any such claim. According to the Court, if "a university decided that its students' First Amendment interests were better protected by some type of optional or refund system it would be free to do so." *Southworth*, 529 U.S. at 232. Like the WEA here, the student organizations had a First Amendment right to speak, but their right to receive money from the university was not based on the constitution. It was based on the university policy that granted the funds. The Court expressly recognized that the university "would be free" to provide greater protection for students "by some type of optional or refund system." *Id.* The university would not have had such freedom if the minimum procedures required to protect the students' First Amendment rights created a First Amendment right in the student organizations to use mandatory student fees for ideological speech.

2. Section 760's Opt-In Requirement Does Not Violate The First Amendment Rights Of Nonmembers Or Unions

a. Section 760 Provides Additional Protection For Nonmembers Of The Union

This Court recognized in *Keller v. State Bar of California*, 496 U.S. 1 (1990), that:

> "*Hudson* . . . outlined a *minimum set of procedures* by which a union in an agency-shop relationship could meet its requirement under *Abood* . . . ." *Keller*, 496 U.S. at 17 (emphasis added).

The laws in Michigan, Illinois, and Washington illustrate that states may and do take different approaches in protecting the interests of nonmembers and in regulating the collection and use of their mandatory fees. The law in Michigan in *Abood* permitted the union to use nonmembers' fees for ideological purposes. *Supra* p. 25. The only protection for nonmembers was the First Amendment and, at minimum, it required that the nonmember be given an opportunity to object to such use. By contrast, the Illinois law in *Hudson* did not permit the union to collect fees to be used for ideological purposes. And the law did not require the nonmember to object to such use. If the nonmembers were satisfied with the union's calculation of the fee, they simply paid the lower amount. *Supra* pp. 26–27. Washington's law is more favorable to the union than the Illinois law in *Hudson*. In Washington, the union can collect a fee equal to the amount of union dues—even if it includes a sum to

be used for ideological purposes. And the union can use the nonmembers' fees for ideological purposes, if the nonmembers consent. In Illinois, even if the nonmembers wished to contribute to the union's ideological speech, the union was prohibited from collecting fees for that purpose.

The opt-in requirement of § 760 serves an important purpose. It ensures that when the union uses nonmembers' fees to influence an election, this use is in accordance with the wishes of the nonmembers who pay the fees. Nonmembers may oppose the union's political use of their fees, or they may simply want to remain silent on the ideological causes the union supports. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' . . . ." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

An opt-out procedure forces nonmembers to speak. In addition, under an opt-out system, if nonmembers are too busy to take the steps necessary to communicate their objections to the union, or even if they simply forget to opt-out within the thirty-day deadline, their fees will be used to influence an election or support a political committee of which they may disapprove or about which they may wish to remain silent.

The opt-in system does not so burden the nonmembers, and it is entirely consistent with the basic principle that, in the face of the First Amendment interests of nonmembers, unions are allowed to collect mandatory agency fees only because their use for collective bargaining and other

representational activities justifies the infringement. Under an opt-in system like Washington's, nonmembers' mandatory fees will be used to support the union's effort to influence an election or support a political committee only if the nonmembers affirmatively consent to have their fees used for this purpose.

The majority below appeared to reject § 760's additional protection for nonmembers because, "[f]or those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." Pet. App. 20a–21a. This conclusion cannot withstand scrutiny. The nonmember has—by definition—made the decision not to associate with the union. However, assuming that nonmembers, nevertheless, wish to support the union's political expenditures, all they have to do is affirmatively consent. Even members of a union must take the affirmative step of joining the union before their consent is assumed. It makes no sense that the simple requirement of consent imposes an unconstitutional burden on the rights of nonmembers.

b. The Additional Protection That § 760 Provides To Nonmembers Does Not Violate The First Amendment Interests Of Unions

The decision below concluded that § 760 was subject to strict scrutiny because it infringed on the First Amendment rights of the

union.[9] Pet. App. 18a. But, as we have explained, the union has no First Amendment rights with regard to nonmembers' fees. The union is allowed to collect mandatory fees in the face of the nonmembers' First Amendment interests only because the union's representational activities justify the collection. Whatever First Amendment rights the union has

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[9] The Washington Supreme Court's alternative holding that § 760 violates the WEA's right of expressive association also is incorrect. The majority below relied on *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). In *Boy Scouts*, the Court held that a state public accommodation law that required the Scouts to include a homosexual as an assistant scout master violated the organization's First Amendment right of expressive association. According to the Court, the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts*, 530 U.S. at 648. However, the right of expressive association is not involved in this case because, in contrast to *Boy Scouts*, § 760 does not force the WEA to accept an unwanted person. The statute applies only to non-members—employees who have made a conscious decision not to join the union. Laws that do not force a group to accept an unwanted member or make membership in a group less attractive do not implicate the right of expressive association. In *Rumsfeld v. Forum For Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1312 (2006), the Court rejected the claim that the Solomon Amendment violated the right of expressive association of law schools. Under the Solomon Amendment, if an institution of higher education denied military recruiters the same access as other recruiters, the institution would lose certain federal funds. The Court denied the plaintiffs' expressive association claim because, "[u]nlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school to accept members it does not desire." *Rumsfeld*, 126 S. Ct. at 1312 (internal quotation marks omitted). Here too, § 760 does not force the WEA to accept a member it does not desire.

with regard to dues paid by its members, § 760 does not impact those rights because § 760 does not apply to members' dues. Section 760 applies only to "agency shop fees paid by an individual who is not a member of the organization . . . ." Pet. App. 138a. Indeed, in *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d 615, 999 P.2d 602 (2000), the Washington Supreme Court recognized that § 760 "restricts the expenditures a labor organization may make in only one way: by preventing labor organizations from using agency shop fees paid by nonmembers to operate a political committee or influence an election." *Id.* at 639. The court explained that by "prohibiting only the use of agency shop fees paid by nonmembers, [§ 760] inferentially allows labor organizations to use dues paid by members for contributions to political committees and candidates." *State ex rel. Evergreen Freedom Found.*, 140 Wash. 2d at 639

The WEA's claim that the greater protection afforded to nonmembers by § 760's opt-in requirement violates its First Amendment rights is essentially the same as the claim rejected by this Court in *Lyng v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America*, 485 U.S. 360 (1988). In *Lyng*, the Court rejected the contention that the associational rights of union members "require the Government to furnish funds to maximize the exercise of that right." *Lyng*, 485 U.S. at 368. *Lyng* concerned an amendment to the Food Stamp Act that provided that "no household shall become eligible to participate in the food stamp program during the

time that any member of the household is on strike or shall increase the allotment of food stamps that it was receiving already because the income of the striking member has decreased." *Lyng*, 485 U.S. at 362. The union claimed that the law violated the "First Amendment rights of the individual plaintiffs to associate . . . with their unions, and with fellow union members . . . ." *Id.* at 363.

The Court disagreed because the statute "d[id] not directly and substantially interfere with appellees' ability to associate . . . ." *Id.* at 366 (internal quotation marks omitted). The statute "d[id] not 'order' [union members] not to associate together for the purpose of conducting a strike, or for any other purpose, and it d[id] not 'prevent' them from associating together or burden their ability to do so in any significant manner." *Id.* The Court relied on *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), to support its conclusion that the statute had no unconstitutional impact on the rights of individuals to associate. According to the *Lyng* Court, *Lincoln Federal*

> "held that where a State forbids employers to restrict employment to members of a union, enforcement of that state policy does not abridge the associational rights of unions or their members, despite their claim that a closed shop is indispensable to the right of self-organization and the association of workers into unions." *Lyng*, 485 U.S. at 366–67 (internal quotation marks omitted).

The Court also disagreed with the union's claim that the law "abridges [the union members'] right to express themselves about union matters free of coercion by the Government." *Lyng*, 485 U.S. at 369. The union relied on *Abood* to support this claim, but the Court rejected the analogy. Unlike the statute in *Abood*, "the statute challenged in this case requires no exaction from any individual; it does not 'coerce' belief; and it does not require appellees to participate in political activities or support political views with which they disagree." *Id.* Instead, the statute "merely declines to extend additional food stamp assistance to striking individuals merely because the decision to strike inevitably leads to a decline in their income." *Id.*

The same is true of § 760. It does not prevent union members from associating or from using union dues for any purpose. It does not coerce belief or require the WEA or its members to participate in political activities or support political views with which they disagree. Section 760 only limits the union's ability to use the fees of nonmembers, who have made the decision not to associate with the union, to influence an election or support a political committee.

Lyng went on to point out that the only impact on union members' "associational rights . . . results from the Government's refusal to extend food stamp benefits to those on strike, who are now without their wage income." *Lyng*, 485 U.S. at 368. The Court recognized that "[d]enying such benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on them to abandon their union. Strikers and their

union would be much better off if food stamps were available . . . ." *Lyng*, 485 U.S. at 368. However, "the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.*

Similarly, in this case, the union would be better off if the law allowed it to freely use nonmembers' mandatory fees to influence elections, if for no other reason than it would provide additional funds for that purpose. The fact that the union would be better off with government compelled financial support for its ideological purposes does not mean that the government's refusal to compel such support violates of the First Amendment interests of the union. Nor does it mean that the government's provision of additional protection for nonmembers violates the First Amendment interests of the union.

In the decision below, the majority concluded that § 760 burdened the right of the union, union members, and nonmembers of the union who wished to support the union's ideological message. Pet. App. 20a–21a. According to the majority, the "WEA presented evidence that the procedures required by the State's interpretation of § 760 would be extremely costly and would have a significant impact on the union's political activities." Pet. App. 20a.[10] This conclusion also is illogical because the

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[10] The evidence referred to by the majority ("*See* Report of Proceedings (RP) at 175–76, 187, 203, 208." Pet. App. 20a.) is set out in the Joint Appendix at pages 104 through 112. The testimony discusses accounting problems if the WEA were to deduct different amounts from various fee payers. However, § 760 does not require that the WEA deduct different amounts from different fee payers. The WEA can collect the

cost imposed on the union by right to work laws is much greater than the costs associated with an opt-in requirement, and those laws do not violate the union's First Amendment rights. *Lincoln Fed.*, 335 U.S. at 530–31.

For example, before Illinois adopted the law authorizing union security agreements, "Union members' dues financed the entire cost of the Union's collective bargaining and contract administration. Nonmembers received the benefits of the Union's representation without making any financial contribution to its cost." *Chicago Teacher's Union, Local 1 v. Hudson*, 475 U.S. 292, 294 (1986). This imposed a substantial financial burden on the union. The union calculated that 95% of union dues paid for collective bargaining and contract administration. *Id.* at 295. Yet this financial burden did not violate the union's First Amendment rights. Given this fact, it is illogical to conclude that the lesser financial burden of complying with § 760 violates the union's First Amendment rights. Moreover, according to the WEA, complying with the *Hudson* process is very labor intensive. J.A. 37. Yet this does not render the *Hudson* process unconstitutional.

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nonmembers' fees, and then, if the union does not receive a nonmember's consent, refund the amount that would go towards influencing an election or operating a political committee. J.A. 137–39. This procedure would pose no problem for the WEA. Indeed, the permanent injunction calls for refunds. J.A. 211. All of the testimony on the pages referred to by the majority below deals with accounting issues. There is no testimony that § 760 would have a significant impact on the union's political activities.

3. Washington's Opt-In Requirement Is Consistent With Federal Campaign Laws Upheld By The Court

Section 760 establishes an opt-in requirement to prevent nonmembers of a union from being compelled to contribute fees to a union to influence an election or support a political committee. This Court has never considered an opt-in requirement as it relates to compelling nonmembers to support a union's political speech.

However, in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*), the Court upheld the opt-in requirement in the Federal Election Campaign Act of 1971. That law made it "'unlawful for any corporation to make a contribution or expenditure in connection with' certain federal elections. 2 U.S.C. § 441b(a)." *NRWC*, 459 U.S. at 198 n.1. The term "contribution" was defined broadly, "but excluded from that definition is 'the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation without capital stock.' [2 U.S.C. § 441b(b)(2)(C]." *NRWC*, 459 U.S. at 198 n.1. By prohibiting the corporation from making contributions, except through a separate fund, the federal law established an opt-in requirement. The law imposed similar restrictions on labor unions.

The Federal Election Commission filed a civil action against the NRWC. In response, the NRWC argued that the law violated its First Amendment right of association. In the case at bar, the WEA has no First Amendment rights with regard to

nonmembers' fees. But in *NRWC*, the Court recognized that "the right of association is a 'basic constitutional freedom' . . . ." *NRWC*, 459 U.S. at 206. However, the Court held "that the associational rights asserted by [*NRWC*] may be and are overborne by the interests Congress has sought to protect in enacting § 441b." *NRWC*, 459 U.S. at 207.

The Court pointed to two purposes of the law. The first was to "ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *Id.* The second purpose was "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 208. The Court agreed "that these purposes are sufficient to justify the regulation at issue." *Id.*

The context of *NRWC* is different from this case in that the corporation had a First Amendment right of association that was overcome by the purpose of Congress in enacting the law. In this case, the WEA has no First Amendment rights with regard to nonmembers' fees. If Congress can require a corporation to make political contributions from a separate, segregated fund supported by voluntary contributions, it surely does not violate the First Amendment to require nonmembers of a union to affirmatively consent before the union uses the

nonmembers' fees to support the union's ideological causes.

Indeed, this conclusion is consistent with one of the purposes of the campaign finance law upheld in *NRWC*—that is "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208. In this case, nonmembers pay fees to the union for the collective bargaining and contract services they receive from the union. This is the only reason nonmembers can be compelled to pay fees to the union in the face of their First Amendment rights. Under the reasoning of *NRWC*, § 760 does not violate the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be reversed.

Respectfully Submitted.

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